Toffoloni v. LFP Publishing Group, LLC Doc. 46

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

MAUREEN TOFFOLONI, as Administratrix and Personal Representative of the ESTATE OF NANCY E. BENOIT, Plaintiff, v. LFP PUBLISHING GROUP, LLC, d/b/a Hustler Magazine, MARK SAMANSKY, an Individual, and other distributors and sellers of, Hustler Magazine, as Defendants X, Y, and Z, Defendants.	)))))))))))))))))	CIVIL ACTION FILE NO. 1:08-CV-0421-TWT

PLAINTIFF'S INITIAL DISCLOSURES

(1) State precisely the classification of the cause of action being filed, brief factual outline of the case including Plaintiff's contentions as to what Defendant did or failed to do, and a succinct statement of the legal issues in the case.

PLAINTIFF'S RESPONSE

Plaintiff alleges that Defendants, jointly and severally, intentionally violated Plaintiff's right of publicity, an intentional tort under Georgia

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law, by publishing and disseminating nude and partially nude images of Plaintiff's decedent without permission and without compensating Plaintiff, the personal representative of the decedent's estate.

(2) Describe in detail all statutes, codes, regulations, legal principles, standards and customs or usages, and illustrative case law which Plaintiff contends are applicable to this action.

PLAINTIFF'S RESPONSE

Defendants violated Georgia law concerning Plaintiff's right to publicity, i.e., Plaintiff's right to control the use of her decedent's image. Plaintiff's right to publicity stems from the Georgia law of the right to privacy.

(3) Provide the name, and, if known, the address and telephone number of each individual likely to have discoverable information that you may use to support your claims or defenses, unless solely for impeachment, identifying the subjects of the information. (Attach witness list to Initial Disclosures as Attachment A.)

PLAINTIFF'S RESPONSE

Defendant LFP Publishing Group, LLC d/b/a Hustler Magazine ("Hustler") admits that it published nude and partially nude images of Plaintiff's decedent in its so-called “March 2008 Edition” without Plaintiff’s permission and without compensating Plaintiff’s estate. Plaintiff is presently unaware when this so-called March Edition was first made available to the public by Defendants.

Upon information and belief, Plaintiff believes that Hustler licensed, conveyed, assigned or otherwise made available to other foreign and domestic publishers unknown to Plaintiff some or all of the said images. These other publishers may have also published some or all of the images. Plaintiff is presently unaware of the extent to which Hustler may have allowed others to publish the images, and is presently unaware of the scope of Defendants’ publication.

Plaintiff Maureen Toffoloni, the Personal Representative of the Estate of Nancy E. Benoit, has knowledge that Defendant LFP Publishing, LLC d/b/a Hustler Magazine published the images of Plaintiff’s decedent. James Daus, the decedent’s former husband, also has knowledge.

There are undoubtedly millions of other individuals who have knowledge of this publication, who are unknown to Plaintiff.

Plaintiff can be contacted through counsel.

James Daus' address and telephone number are as follows:

2620 Pheasant Village

DeLand, Florida 32720

(386) 717-8981

(4) Provide the name of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence. For all experts described in Fed.R.Civ.P.26(a)(2)(B), provide a separate written report satisfying the provisions of that rule. (Attach expert witness list and written reports to Responses to Initial Disclosures as Attachment B.)

PLAINTIFF'S RESPONSE

Plaintiff has not employed an expert at this time.

(5) Provide a copy of, or a description by category and location of, all documents, data compilations, and tangible things in your possession, custody, or control that you may use to support your claims or defenses unless solely for impeachment, identifying the subjects of the information. (Attach document list and descriptions to Initial Disclosures as Attachment C.)

PLAINTIFF'S RESPONSE

A copy of the offending images and the cover and page contents of Defendant's "March Edition" were filed with the Complaint under seal.

(6) In the space provided below, provide a computation of any category of damages claimed by you. In addition, include a copy of, or describe by category and location of, the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered, making such documents or evidentiary material available for inspection and copying as under Fed. R. Civ. P. 34. (Attach any copies and descriptions to Initial disclosures as Attachment D.)

PLAINTIFF'S RESPONSE

It is Plaintiff's position, as the result of the opinion and judgment of the 11th Circuit Court of Appeals in *Toffoloni v. LFP Publishing Group, LLC*, 572 F.3d 1201 (11th Cir. 2009), coupled with the admissions of the Defendant, that the liability of Hustler for the violation of Plaintiff's right of publicity has been finally and conclusively established.

Further, as set forth in the opinion of the Court in _Toffoloni_, _supra_, the measure of damages in this case is the value to the Defendants' of the Defendants' use of the images of Plaintiff's decedent for commercial purposes.

Plaintiff also claims punitive damages under O.C.G.A. § 51-12-5.1 because of the intentional nature of the wrong committed. Plaintiff's claim for punitive damages under O.C.G.A. § 51-12-5.1 is without limitation, except as measured by the enlightened consciences of impartial jurors, due to the Defendants' specific intent to cause harm to the Plaintiff.

Plaintiff also claims attorneys' fees and expenses of litigation, because of the Defendants' intentional wrongdoing, pursuant to O.C.G.A. § 13-6-11, i.e., the Defendants' "bad faith" in connection with the wrongs committed.

Plaintiff will require discovery from Defendants with respect to the value received by Defendants from Defendants' multiple unauthorized uses of Plaintiff's decedent's images for commercial purposes. Plaintiff will also require discovery from the Defendants concerning the Defendants' "worldly circumstances" for the purpose of punitive damages.

(7) Attach for inspection and copying as under Fed.R.Civ.P. 34 any insurance agreement under which any person carrying on an insurance business may

be liable to satisfy part or all of a judgment which may be entered in this action or to indemnify or reimburse for payments made to satisfy the judgment. (Attach copy of insurance agreement to Initial Disclosures as Attachment E.)

PLAINTIFF'S RESPONSE

Not applicable to Plaintiff.

(8) Disclose the full name, address, and telephone number of all persons or legal entities who have a subrogation interest in the cause of action set forth in plaintiffs cause of action and state the basis and extent of such interest.

PLAINTIFF'S RESPONSE

Not applicable to Plaintiff.

Respectfully submitted October 12, 2009.

/s/ Richard P. Decker
RICHARD P. DECKER
State Bar of Georgia #215600

For HALLMAN & WINGATE, LLC
Attorneys for Plaintiff

166 Anderson Street, S.E.
Suite 210
Marietta, Georgia 30060
(404) 588-2530

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CERTIFICATE OF SERVICE

This is to certify that on October 12, 2009, I have electronically filed the foregoing Plaintiffs' Initial Disclosures with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorney(s) of record:

Barry J. Armstrong, Esq.
James Clifton Rawls, Esq.
S. Derek Bauer, Esq.

Barry J. Armstrong, Esq.
Darrell Jay Solomon, Esq.
Jeffrey F. Reina, Esq.

and by placing a copy of same in the United States Mail in a properly addressed envelope with adequate postage thereon to:

William M. Feigenbaum, Esq.
Lipsitz, Green, Scime, Cambria, LLP
42 Delaware Avenue, Suite 120
Buffalo, NY 14202

Paul J. Cambria, Esq.
Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria, LLP
42 Delaware Avenue, Suite 300
Buffalo, NY 14202

/s/ Richard P. Decker
RICHARD P. DECKER
State Bar of Georgia #215600

For HALLMAN & WINGATE, LLC
Attorneys for Plaintiff

166 Anderson Street, S.E.
Suite 210
Marietta, Georgia 30060
(404) 588-2530

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